No. 89-777

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES GYPSUM COMPANY,

Petitioner,

v.

THE WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF RESPONDENT THE WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH IN OPPOSITION

PETER T. ENSLEIN*
PATRICK S. GUILFOYLE
ASHCRAFT & GEREL
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400

Attorneys for Respondent

* Counsel of Record

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Respondent, The Wesley Theological Seminary of the United Methodist Church ("Wesley"), respectfully asks that the petition for a writ of certiorari sought by United States Gypsum Company ("USG") to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered May 19, 1989 be denied.

COUNTERSTATEMENT OF THE CASE

This is an asbestos property damage action brought by Wesley, a nonprofit organization located in the District of Columbia. Suit was filed in the United States District Court for the District of Columbia on May 17, 1985 against, among others, USG, a Chicago-based manufacturer of asbestos-containing building products.

Wesley's complaint sought damages in tort and in contract because its buildings were contaminated by USG's asbestos-containing acoustical plaster. USG's plaster was installed in three of Wesley's buildings during its construction which was completed in 1960. In 1984, Wesley's campus was inspected by an industrial hygienist and found to be contaminated by USG's product. The hygienist recommended its removal. Wesley has removed some of this product and faces the expensive prospect of eventually removing all of it.

On December 12, 1986, USG moved for partial summary judgment, claiming that D.C. Code § 12-310 (1981) ("§ 12-310") barred Wesley's action. Section 12-310, enacted in 1972, twelve years after the construction of Wesley's campus, provides in pertinent part:

> (a)(1) Except as provided in subsection (b), any action –
>
> (A) to recover damages for –
>
> * * *
>
> (ii) injury to real or personal property, . . . resulting from the defective or unsafe condition of an improvement to real property, and
>
> (B) for contribution or indemnity which is brought as a result of such

> injury . . . , shall be barred unless in the case where injury is the basis of such action, such injury occurs within the ten-year period beginning on the date the improvement was substantially completed . . . .
>
> (2) For purposes of this subsection, an improvement to real property shall be considered substantially completed when –
>
> (A) it is first used, or
>
> (B) it is first available for use after having been completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.
>
> (b) The limitation of actions prescribed in subsection (a) shall not apply to –
>
> (1) any action based on a contract, express or implied, or
>
> (2) any action brought against the person who, at the time the defective or unsafe condition of the improvement to real property caused injury . . . , was the owner of or in actual possession or control of such real property.

On October 4, 1985, the District of Columbia Court of Appeals held for the first time that the protection afforded by § 12-310 extended to manufacturers and suppliers of improvements to real property. *See J.H. Westerman v. Fireman's Fund Insurance Co.*, 499 A.2d 116, 120-21 (D.C. 1985). However, on February 28, 1987, the District of Columbia Statute of Limitations Amendment Act ("the Act") became law. D.C. Law 6-202, 34 D.C.R. 527 (1987), *codified* at D.C. Code §§ 12-301, 12-310(b)(2)-(4), 12-311 (Michie Supp. 1988). The Act amended § 12-310 by

removing manufacturers and suppliers from the ambit of its protection. The Act amended § 12-310 as follows:

> (b) The limitation of actions prescribed in subsection (a) shall not apply to –
>
> * * *
>
> (3) any manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property . . .
>
> * * *

The Act also amended D.C. Code § 12-301 by extending the former three-year statute of limitations for actions claiming injury to real estate. The Act created a new subsection, 301(10), a five-year statute of limitations for actions claiming injury to real estate "from toxic substances including products containing asbestos." The Act also established a new, more liberal statute of limitations for "actions arising out of death or injury caused by exposure to asbestos." D.C. Code § 12-311 (Michie Supp. 1988). *See Gwyer v. The Celotex Corp.*, ___ A.2d ___, 117 D.W.L.R. 2617 (D.C. Sup. 1989). Finally, the amendments were made applicable to all actions pending at the time the amendments took effect. *See* D.C. Code § 12-311 note (Michie Supp. 1988); D.C. Law 6-202, § 6.

On May 11, 1987, Wesley filed a motion for partial summary judgment. In that motion, Wesley maintained that under the amendments to D.C. Code §§ 12-301 and 12-310, its claims were timely as a matter of law.

On January 5, 1988, the District Court entered a partial summary judgment, dismissing all of Wesley's tort claims as time-barred under § 12-310. However, the court

determined that Wesley's contract claim was still actionable. App. 29a.*

On April 28, 1988, trial began. A jury later returned a verdict in favor of USG on Wesley's contract claim. On the same day, the District Court entered final judgment.

On June 10, 1988, Wesley filed its Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit. On appeal, Wesley maintained that the District Court decision was mistaken for two reasons: (1) the Supreme Court has consistently held that a legislature may restore a barred remedy without violating the Constitution and this rule applies to § 12-310 whether it is viewed as a procedural or a substantive provision; and (2) even if the amendments to § 12-310 are viewed as altering a substantive law by creating potential liability for past conduct, they do not violate the Constitution. *See* Brief of Appellant at 21-22. USG maintained that only changes in purely procedural provisions may be retroactive while changes in substantive ones may not. USG urged that § 12-310 was a "substantive" provision that conferred "vested rights" which could not be abrogated constitutionally. *See* Brief of Appellee at 9. The Court of Appeals reversed, holding that the retroactive application of the amendments to § 12-310 was constitutional. On August 14, 1989, the Court of Appeals denied reconsideration *en banc*.

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* Citations to "App." are to the petitioner's appendix.

REASONS WHY THE WRIT SHOULD BE DENIED

USG contends that the Court of Appeals' reversal of the District Court's ruling on the statute of repose defies precedents which constrain retroactive legislation on due process grounds and that a departure from these precedents "will create confusion in the lower courts" where similar statutes of repose (and similar amendments to such statutes) are presently being construed. *See* Petition at 12. Neither of these arguments has merit. In fact, the Court of Appeals' decision is wholly in line with the decades-old acceptance of the constitutionality of retroactive economic legislation. USG's contrary view rests on the nondispositive substantive/procedural test, a legal distinction variously considered by the courts and scholars to be abstract, metaphysical and even conclusory. USG would defend itself (and the entire asbestos industry) at the expense of the power of legislatures to act in the public interest.

I. USG's Substantive/Procedural Analysis Has No Bearing on the Constitutionality of Retroactive Economic Legislation.

USG treats the Court of Appeals' decision as if it were the watershed – a sudden and impermissible departure from the notion that substantive (as opposed to procedural) rights enjoy a special status that places them beyond the reach of legislatures. The Court of Appeals, however, hewed closely to a long tradition upholding statutes essentially identical to the Act.

In 1960 (the year in which the buildings involved in this litigation were completed), Charles B. Hochman

published *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960), an exhaustive study of the very issues at the heart of this litigation. From his survey of this Court's apposite decisions, Hochman concluded that the constitutionality of retroactive legislation is determined by the weighing of three factors:

> [1] the nature and strength of the public interest served by the statute, [2] the extent to which the statute modifies or abrogates the asserted pre-enactment right, and [3] the nature of the right which the statute alters.

Id. at 697.

In deciding the present case, the Court of Appeals gave ample consideration to each of these factors, which are clearly no less dispositive in this context than when Hochman identified them thirty years ago.

First, the Court of Appeals carefully considered the Act, noting that USG had never denied that this statute serves a rational purpose, *i.e.*, to assure "that the losses due to defects in building materials discovered long after installation should fall on the supplier rather than the building's owner."[1] App. 6a-7a. That retroactive economic

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[1] USG avers that the District of Columbia "used a variety of procedural maneuvers to make sure [that the D.C. Law 6-202] was enacted . . . ." Petition at 4, n.2. USG made no argument respecting the manner in which 6-202 became law either before the trial court or the Court of Appeals, thereby waiving its right to do so now. Moreover, USG's belated attack on this lawmaking falls short of saying that any lack of due process was involved.

legislation need merely serve a rational purpose to satisfy this aspect of due process is the unequivocal holding of the cases upon which the Court of Appeals relied, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) and *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).[2]

Second, the Court of Appeals implicitly addressed the next factor discussed by Hochman – the extent of the abrogation of the preenactment right. USG's facile resolution of this issue reduces to a comparison of "substantive rights," whose retroactive amendment violates due process, and "procedural rights," which are freely amendable. This untenable theory is the basis for the only "question presented" by USG:

> Whether a statute of repose, which grants a substantive right to be free from stale lawsuits, may be amended retroactively to revive potential liabilities that the statute had expressly extinguished.

Petition at i.

USG considers the right it formerly enjoyed under the statute of repose to be "vested," a term that Hochman and the courts consider conclusory because, as Hochman

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[2] From reading Hochman's article and the cases discussed therein, as well as the more recent *Turner Elkhorn* and *Gray*, it is evident that in the past quarter century this Court has become increasingly reluctant to second-guess a legislature's understanding of how best to serve the commonweal, at least where the legislation at issue seeks only to adjust "burdens and benefits of economic life." *Turner Elkhorn*, 428 U.S. at 15. Hence, although Hochman considers the strength of the public interest served by a given statute, the Court's more recent decisions focus merely on whether a legislature has acted rationally.

writes, "a right is vested when it has been so far perfected that it cannot be taken away by statute." 73 Harv. L. Rev. at 696. The validity of USG's argument therefore turns on whether statutes such as the one under review actually confer rights that legislatures may not alter. Hochman dismisses this argument:

> It is immaterial for our purposes whether one accepts the view that the very existence of a legal right depends upon the availability of remedies through which the right can be asserted and enforced.
>
> Although the right-remedy dichotomy is conclusory only, and therefore of little use in deciding a particular case, the Court's use of this terminology has raised some problems. One is whether the state's characterization of a legally assertable claim or defense as either a right or a remedy will be binding on the Court in determining the constitutionality of a subsequent statute altering the legal effect of this claim or defense. One obvious example of this problem appears when the state extends its statute of limitations so as to revive barred claims and thereby deprive a defendant of a defense he would have had under the unamended statute. It seems clear that whether the state characterizes its statute of limitations as abrogating the remedy or the right is immaterial in determining whether the removal of the statutory defense deprives a defendant of due process. See Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); Campbell v. Holt, 115 U.S. 620 (1885). The question involves nothing more than an interpretation of the Constitution, *cf.* Hart & Wechsler, The Federal Courts and the Federal System 467 (1953), and this is true whether the claim asserted depends upon state or federal law . . . .

Id. at 711-12, n. 106 (citations omitted).

The Court of Appeals here likewise saw the substantive/procedural distinction as a red herring. Citing *Chase Securities* and *Campbell,* as well as *Industrial Union of Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976), the Court of Appeals concluded that even if the distinction urged by USG "proved that statutes of repose were substantive it would not advance our resolution of the constitutional claim."[3] App. 7a.

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[3] USG complains that the Court of Appeals failed to distinguish *William Danzer & Co. v. Gulf & Ship Island R.R. Co.,* 268 U.S. 633 (1925). "[I]ndeed," writes USG, "*Danzer* was not even cited." Petition at 9. *Danzer* likewise receives no mention in *Turner Elkhorn, Gray,* and for that matter, Hochman's survey. Whatever else explains the tendency of *Danzer* to be overlooked, Wesley submits that *Danzer* can in fact be distinguished from the present case. In *Danzer,* the Court held that where the Interstate Commerce Act created a cause of action for damage claims and fixed a period in which such claims must be presented, a plaintiff's claim could not be revived by an amendment which would have made the claim timely. However, in subsequent cases, the Court did not follow *Danzer.* In *Chase Securities,* the Court relegated *Danzer* to a footnote. The Court determined that *Danzer* does not apply when a cause of action has a common law basis and is therefore independent of the statute creating the limitations period. 325 U.S. at 312, n.8. That is precisely the situation here. In *Robbins & Myers,* the Court effectively overruled *Danzer* when it declined to apply its holding. There, the Court applied the holding in *Chase Securities,* upholding an amendment extending a limitations period that had already expired and that was part of the original enabling act. 429 U.S. at 243-44. Thus, even if § 12-310 is somehow considered to be equivalent to a statute which creates a cause of action, it is clear under *Robbins & Myers* that the District of Columbia did not violate the Constitution when it revived time-barred claims against manufacturers and suppliers of defective and unsafe improvements to real property.

USG's substantive/procedural analysis does not adequately test the fairness of retroactive legislation because, as Hochman writes:

> the relevant factor in determining the weight to be given to the extent to which a preexisting right is abrogated is not whether the statute abolishes rights or remedies, but rather the degree to which the statute alters the legal incidents of a claim arising from a preenactment transaction; the greater the alteration of these legal incidents, the weaker is the case for the constitutionality of the statute.

Id. at 712.

USG never focuses upon preenactment "legal incidents" because to do so compels the conclusion that USG and other asbestos manufacturers received undeserved protection from the statute of repose. Before the statute of repose was passed, strict liability and other tort causes of action were commonly resorted to against asbestos manufacturers who, in turn, relied upon a panoply of traditional defenses. The statute of repose did not change the essence of these "legal incidents;" it merely set a time limit (ten years) within which a plaintiff's injury had to occur if it was to be actionable.

The statute of repose, however, had two odious effects: first, it often divested plaintiffs (like Wesley) of their causes of action against manufacturers before there had even been a realization of injury (which, unlike the instant case, was truly a matter of due process denied); and second, it made building owners legally responsible for the safety of building products in whose manufacture they played no part. The *status quo* was understandably appealing to USG and just as understandably the target

for remedial legislation by the City Council. Nonetheless, when the statute of repose was amended, the essential "legal incidents" once again did not change – the same causes of action exist and the same substantive defenses, only a time limit that unfairly protected manufacturers has been removed.

The third (and last) of the factors discussed by Hochman – the nature of the right affected by a retroactive statute – touches upon matters of reliance that simply do not avail USG:

> Although the Court has refused to give any significant weight to the fact that the right modified by a retroactive statute has been asserted in a suit prior to the passage of the statute, once such a right has been reduced to judgment, the interest in stability is present to a significantly greater degree than at any time before judgment. Moreover, there is likely to be substantial reliance on the judgment. For these reasons, the Court has indicated that it would be reluctant to permit the legislature to interfere with a right which has been "adjudicated . . . in final and unreviewable determination." However, it must be remembered that this is only one of many considerations in determining the constitutionality of retroactive legislation, and in any given case, the Court may deem the interests in the retroactive application of the statute to a right which has been reduced to judgment prior to its enactment sufficient to outweigh the disadvantages of such application. . . .

Id. at 718-19 (footnote omitted).

USG, of course, cannot contend that its rights under the statute of repose had been litigated to "unreviewable determination," a judgment upon which it was entitled to

rely. Moreover, another type of reliance of which Hochman writes is equally inapplicable to USG:

> [a statute] which has the effect of implementing the original intentions of the parties affected has generally been held constitutional since there is little injustice in retroactively depriving a person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the right arose.

Id. at 720 (footnote omitted). As the Court of Appeals noted, the right of which USG was later divested was not in existence until 1972, "about 12 years after the last building at issue was completed. Thus [USG] made the sales [to Wesley] without reliance on the statute." App. 7a.

II. The Decision of the Court of Appeals Comports with the Resolution of Similar Cases by Other Courts.

USG's concern that the Court of Appeals' decision will "cause great confusion in both state and federal courts" is unfounded. *See* Petition at 12. Indeed, this argument ignores the numerous state and federal decisions upholding the constitutionality of similar revival statutes. In fact, "[s]ince *Chase Securities*, no federal court [has] struck down a revival statute." *In Re: Eastern and Southern Districts Asbestos Litigation* (E.D. N.Y. order entered Aug. 16, 1988)* at 10. In recent years, many states

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* Copies of all unpublished cases and materials cited herein have been lodged with the Clerk of the Court.

have amended their laws to revive time-barred claims involving personal injury and property damage caused by asbestos and other toxic substances. The federal courts are unanimous in their decisions upholding the constitutionality of such statutes. *See, e.g., Murphree v. Raybestos-Manhattan, Inc.*, 696 F.2d 459, 462 (6th Cir. 1982) (upholding the constitutionality of a retroactive amendment to Tennessee's ten-year product liability statute of repose, exempting asbestos personal injury actions, Tenn. Code Ann. § 29-28-103(b)); *In Re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 810-13 (E.D. N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) (upholding the constitutionality of a New York revival statute permitting servicemen injured by dioxin to bring suit regardless of when their injuries were discovered, New York Civ. Prac. Law 214-b); and *In Re: Eastern and Southern Districts Asbestos Litigation* (upholding the constitutionality of the New York Toxic Tort Revival Act, 1986 N.Y. Laws, ch. 682, § 4 (McKinney 1986), New York Civ. Prac. Law 214-c). The state courts have reached similar conclusions. *See City of Boston v. Keene Corporation*, 406 Mass. 301, 547 N.E.2d 328 (1989) (upholding the constitutionality of Massachusetts' revival statute for "asbestos-related corrective actions" brought by the Commonwealth or any of its political divisions, Mass. Gen. L. ch. 260, § 2D (West Supp. 1989)); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069 (1989) (upholding the constitutionality of the New York Toxic Tort Revival Act); and *In Re: State and Regents' Building Asbestos Cases*, No. 99081 (Minn. Dist. March 6, 1989) (upholding the constitutionality of a retroactive application of an amendment to Minnesota's ten-year

statute of repose, reviving time-barred asbestos cost recovery actions, Minn. Stat. §§ 541.051, 541.22 (1989)).[4]

USG ignores other cases which have employed the *Turner Elkhorn* analysis to uphold the constitutionality of a retroactive imposition of liability. In *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), the Eighth Circuit upheld the constitutionality of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"). CERCLA retroactively imposes strict liability on persons responsible for the release of hazardous substances into the environment. The Eighth Circuit rejected the contention that because the statute "imposes a new kind of liability, retroactive application of CERCLA violates due process . . . ." 810 F.2d at 732. Relying on the rational basis test adopted by this Court in *Turner Elkhorn* and in *Pension Guaranty*, the Court of Appeals found that

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[4] USG cites only two decisions reaching a contrary result: *Colony Hill Condominium I Ass'n v. Colony Co.*, 70 N.C. App. 390, 320 S.E.2d 273 (1984), *rev. denied*, 312 N.C. 796, 325 S.E.2d 485 (1985) and *School Board of Norfolk v. United States Gypsum Co.*, 234 Va. 32, 360 S.E.2d 325 (1987). Neither of these cases supports USG's position. In the latter case, the Virginia Supreme Court found the Commonwealth's revival statute violative of the due process clause of the Virginia Constitution, whose provisions are not at issue here. *Colony Hill* and the case on which it relies, *McCrather v. Stone & Webster Engineering Corp.*, 248 N.C. 707, 104 S.E.2d 858 (1958), exemplify the fallacious substantive/procedural analysis which this Court long ago rejected as noted by Hochman, discussed *supra*. Moreover, most state courts have interpreted legislation which revives a time-barred right of action as not violative of state constitutional due process provisions. *See School Board of Norfolk*, 360 S.E.2d at 335 (Whiting, J. dissenting).

defendants "failed to show that Congress acted in an arbitrary and irrational manner." "Cleaning up inactive and abandoned hazardous waste disposal sites," the court wrote, "is a legitimate legislative purpose and Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites on those parties who created and profited from the sites and on the chemical industry as a whole." 810 F.2d at 734. *Accord United States v. Monsanto Co.*, 858 F.2d 160, 174 n.31 (4th Cir. 1988), *cert. denied*, 491 U.S. ___, 109 S.Ct. 3156 (1989).[5]

Finally, USG also ignores those cases holding that retroactive statutes eliminating immunity from tort liability do not violate due process. In *Louviere v. Marathon Oil Co.*, 755 F.2d 428, 430 (5th Cir. 1985), the Fifth Circuit allowed Congress' retroactive cure of this Court's interpretation of the Longshoremen's and Harbor Workers Compensation Act in *Washington Metropolitan Area Transit Authority v. Johnson*, 468 U.S. 1226 (1984). In *Washington Metropolitan Area Transit Authority*, the Court held that general contractors were immune from suit brought by a subcontractor's employees unless the contractor neglected to secure compensation coverage for those

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[5] USG cites *United States v. Rohm and Haas Co.*, 669 F. Supp. 672 (D. N.J. 1987), for the concept that "vested" substantive rights, as opposed to procedural rights, may not be altered retroactively. *See* Petition at 12. USG fears that confusion will result from the coexistence of the *Rohm and Haas* holding and that reached by the Court of Appeals here. On the contrary, it is plain from reading *Chase Securities* and Hochman's survey of other cases which consider vested rights that *Rohm and Haas* relies on a long-abandoned test for the constitutionality of retroactive economic statutes.

employees after the subcontractor failed to do so. While the case was still on appeal, Congress amended the statute to immunize contractors from suit by a subcontractor's employees only if the subcontractor had been statutorily required to obtain coverage for the subcontractor's employees. The Fifth Circuit rejected the contractor's contention that the application of the amendments "would violate [its] due process rights by retroactively divesting it of its vested right to a defense under § 905(a) as interpreted by *Washington Area Transit Authority* or by creating a cause of action on a retrospective basis . . . ." 755 F.2d at 430. The court observed that Marathon Oil "of course has no vested right to act negligently; nor is there any suggestion of significant detrimental reliance on the rule of *Washington Area Transit Authority*." 755 F.2d at 430.

The District of Columbia amended § 12-310 to cure the effect of the District of Columbia Court of Appeals' decision in *J.H. Westerman* deeming manufacturers and suppliers to be within the ambit of the statute. The statute's 1986 amendment was designed to bring § 12-310 into conformity with the "overwhelming majority" of jurisdictions which limit such statutory protection to designers and builders. *See City Council of the District of Columbia Roundtable Meeting of the Judiciary Committee on Bill 6-510* (Oct. 15, 1986) at 2; *see also J.H. Westerman Co.*, 499 A.2d at 120 ("overwhelming majority of such state statutes . . . exclude from their coverage product manufacturers and suppliers."). As noted earlier, USG sold its product to Wesley many years before *J.H. Westerman* and therefore did not rely on the *J.H. Westerman* court's interpretation of § 12-310.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER T. ENSLEIN*
PATRICK S. GUILFOYLE
ASHCRAFT & GEREL
2000 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400

Attorneys for Respondent

* Counsel of Record

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